1992

State of Utah v. Douglas Edward Kay : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT STATE OF UTAH

No. 920265

STATE OF UTAH,	)	
Plaintiff-Respondent,	)	Case No. 920265
v.	)	
DOUGLAS EDWARD KAY,	)	
Defendant-Appellant.	)	Priority No. 1

APPELLANT'S PETITION FOR REHEARING

PETITION FOR REHEARING IN THE INTERLOCUTORY APPEAL FROM ORDER OF THE FIFTH DISTRICT COURT, IN AND FOR WASHINGTON COUNTY, STATE OF UTAH, HON. J. HARLAN BURNS, PRESIDING

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STATEMENT OF ISSUES PRESENTED ON PETITION FOR REHEARING

1. Does ongoing, statewide pre-trial publicity arising from this Court's decision, resurrected from Defendant's conditional plea, effectively deny him a fair trial anywhere in Utah now, essentially limiting his remedy to standing on the plea and going forward with sentencing?

2. Given that Defendant only has one realistic course of action left, to wit: standing on his plea and going forward to sentencing, after having confessed in reliance, of the District Court's promise to spare his life and with no objection from the State, is the remedy offered by this Honorable Court, under the circumstances existing now, so harsh as to deny Defendant due process of law, requiring additional relief therefore?

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	)	
Plaintiff-Respondent,	)	Case No. 20265
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APPELLANT'S PETITION FOR REHEARING

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STATEMENT OF THE CASE

This is a Petition for Rehearing of the March 7, 1986 decision of the above Court wherein this Court, after upholding the Defendant's position in many particulars, also upheld Hon. J. Harlan Burn's decision to not enforce the Conditional Plea agreement whereby Defendant's life would be spared if he would plead guilty to three counts of capital murder and four counts of aggravated robbery.

Defendant respectfully requests this Court to reconsider its decision in light of ongoing new pretrial publicity throughout the State of Utah, and consider whether same effectively denies Defendant one of the remedies offered by this Honorable Court, to wit: a jury trial, and whether the only other realistic alternative places Defendant in a position of no choice at all but rather of being forced to go

forward to sentencing on the basis of an illegally obtained confession.

STATEMENT OF FACTS

Defendant agrees with the fact statement set out in State v. Kay, 29 Utah Adv. Rep. 30,___ P.2d_____, (1986), for purposes of this Petition. Defendant also incorporates herein certain representative newspaper articles, attached hereto as Appendix A and made a part hereof. Defendant further respectfully requests this Court to take Judicial Notice of the statewide and ongoing publicity of this case, as a matter of fact, pursuant to U.R.Ev. Rule 201(b)(1) and 201(b)(2), and 201(c).

SUMMARY OF ARGUMENTS

This Court's analysis in State v. Kay, supra, does not take into account the effects of on-going publicity, including resurrected, and often inaccurate and inflammatory, media accounts of Defendant's "horrifying tale" of "execution-style slaying," which publicity effectively denies Defendant meaningful access to a jury trial and/or a fair trial.

With only one realistic remedy left, this Court should

The Daily Spectrum, Washington County Edition, Thursday, March 27, 1986 p.3.

respectfully reconsider additional appropriate remedies, including specific performance of the conditional plea, particularly in light of the State's failure to object, thereby luring Defendant into not only a "chilling" confession but also into providing prosecutors with a road-map of the case.

ARGUMENT

POINT I

In its appellate brief, Defendant stated at p. 41 that

> The cure in the instant case is to order the District Court to grant specific performance to Mr. Kay, not to compound error on error by depriving him of more of his fundamental freedoms by giving the State an unnecessary publicity tainted second bite at the apple in some other county....

Defendant was no less concerned about adverse prejudicial publicity on November 28, 1984, when his Appellate Brief was filed, than he is about inflammatory press coverage in March, April, or November of 1986, when he is headed to trial and/or sentencing.

This Court, however, did not address the issue of adverse publicity denying him a fair trial in its decision, although in Part IV of its opinion in State v. Kay, supra at 37, it did address "fundamental fairness" as applied to due

process and specific performance, but stops there, stating "[We] have considered Kay's other contentions on appeal and find them to be without merit."

In light of statewide and inflammatary reporting of this case, including of this Court's own decision, Defendant respectfully requests this Court to (1) take Judicial Notice of such publicity and consider same, and (2) reconsider its conclusion that Mr. Kay can go forward to trial without prejudicial effect.

This Court is also respectfully requested to take Judicial Notice of State of Utah v. Norman Lee Newstead, now before this Court, and of the statewide publicity that this case has generated to the detriment of Mr. Kay's ability to receive a fair trial, and in light of Mr. Newstead's blaming Mr. Kay for the alleged murders in question in avoiding the Death Penalty himself.

Without rearguing what has already been submitted, Defendant respectfully refers this Court to Appellant's Brief, IIC, at 38, for consideration in light of the new and ongoing publicity, and of the changed circumstances caused by Mr. Newstead's testimony. Defendant also argues that it would be unrealistic to assume that (1) the publicity will decrease,

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State v. Kay, supra, at 38.

UTAH RULES OF EVID. Rule 201(b)(1), 201(b)(2), and 201(c).

rather than increase in scope, intensity, and harm, as trial approaches, and (2) that such publicity will not have a permanent and prejudicial effect on potential jurors anywhere in Utah, (3) adversely affecting Mr. Kay's ability to receive a meaningful jury trial or a fair trial.

Defendant does not impute any malice or ill will to the media in its coverage of this case, but realizes that the sensationalism inherent in mass media crime reporting cannot help but have the unintended but fatal result of denying Mr. Kay a fair trial, or a jury trial, thereby denying him two fundamental protections under both the Constitution of the United States of America and the Constitution of the State of Utah.

POINT II

In light of the above, Defendant has only one real remedy, not two, as the Court offered in its decision. He can only stand on his plea and go forward to sentencing.

Accordingly, this Court should now reconsider specific performance or some other appropriate remedy where Defendant now only has on realistic route, and that route itself being a result of a promise and state acquiescence of same.

> "The State certainly had ample grounds for raising objection at the time the plea was taken; however, it waived those objections by its failure to raise them at the time the pleas were accepted."

CONCLUSION

With life or death literally at issue, Defendant respectfully requests and urges this Court to review its decision in light of the improbability that Mr. Kay will ever receive a fair trial anywhere in Utah as a result of statewide media coverage which resurrects his initial confession, and which uses such inflammatory words as "horrifying" and "execution style". Defendant submits that no matter what precautionary or protective measures are taken, that this publicity--arising from a confession where the state waived timely objection--will follow Mr. Kay through jury selection and into trial, thereby denying him fundamental trial protections and rights.

The Defendant certifies that this petition is presented in good faith, for the reasons set out herein, and not for purposes of delay.

Dated this 4 day of April, 1986.

R. CLAYTON HUNTSMAN
Attorney for Defendant-Appellant

PHILLIP LANG FOREMASTER
Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE BY MAILING

I do hereby certify that on the 31 day of March 1986, I mailed four copies of the foregoing Petition for Rehearing to the below-named attorneys for the State of Utah:

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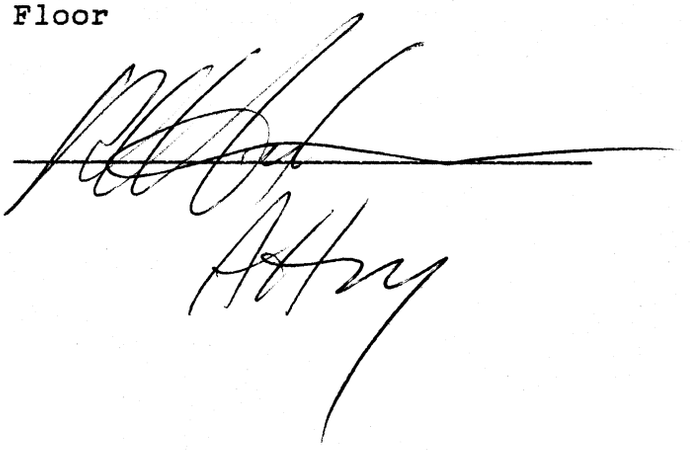

Supreme Court grants filing extension in Kay case

by Kristine Messerly
Staff Writer

CEDAR CITY — The Utah Supreme Court has given attorneys for confessed Playhouse murderer Douglas Edward Kay an extension on the deadline to file a motion for a rehearing in his case, a court clerk said today.

Kay's attorney, Clayton Huntsman, was granted until April 1 to ask the court to review its March 7 decision in which it remanded jurisdiction in the case back to 5th District Court for settlement, an extension of one week on the usual time allowed for such a motion.

Huntsman said Wednesday he asked for an extra week to review the lengthy Supreme Court opinion in order to decide whether a motion for a rehearing was proper.

Should Huntsman choose to file motions in federal court asking for relief in the case, he would be required to have exhausted all possible state remedies — including the filing of a motion asking the high court to reconsider its decision.

Motions for rehearings are rarely granted, but serve the purpose of giving the justices a chance to review and revise their opinion.

Huntsman said he will ask for a rehearing if he decides there are grounds for asking for such a review — if, for example, he decides changed circumstances justify a rehearing, or if parts of the opinion are unclear or contradictory, requiring further explanation by the court.

After more than a year's time for consideration, the justices, in a 25-page opinion handed down March 7, denied Kay's interlocutory appeal, which had asked the court to enforce a unique plea bargain agreement struck between Judge J. Harlan Burns and Kay. Kay pleaded guilty to three counts of capital homicide in exchange for a promise that the would be sentenced to life imprisonment rather than death.

After hearing a horrifying tale in which Kay described the execution-style slaying of three victims during a robbery of the bar, Burns accepted the pleas without objection from Iron County Attorney Scott Thorley.

Two weeks later Thorley did object, and after hearing argument on the propriety of the plea arrangement Burns reversed his decision to accept the plea, ruling that the court was not bound to by the agreement to impose life imprisonment and basing his ruling in part on the fact that the prosecution was suprised by the conditional plea. He gave Kay the option of withdrawing his guilty pleas or proceeding to sentencing with the possibility of being sentenced to death.

Kay instead asked the Supreme Court to step in to order enforcement of the plea bargain. His attorneys also argued that the principles of double jeopardy precluded the option of setting the pleas aside and forcing him to begin the process anew and that the trial court's actions violated Kay's rights to due process.

The high court ruled the plea bargain did violate procedural requirements of trial courts, but the violation did not render the plea agreement invalid. "... We do not find that the trial court abused its discretion in declaring a misplea and ordering Kay to either face sentencing or to withdraw his plea of guilty," the court ruled. "The trial court found that the conditional plea was illegal."

The high court did rule that a "series of errors" took place when Huntsman proposed the plea and when Burns agreed to entertain the plea without gaining the express approval of the plea by Thorley.

The problems were "compounded by the prosecution," according to the Supreme Cout opinion.

"A timely objection by the state would have prompted the judge to stop the proceedings and would have obviated the resulting problems," according to the opinion.

The justices say in a footnote to the opinion that "we are deeply troubled by the prosecution's conduct" in not framing a timely objection. The prosecution raised objections "only after a new lead counsel's appearance and after the defendant's open court confession had thoroughly inflamed the public," the justices say.

Despite the series of mistakes by attorneys for both sides and by Judge Burns, the high court ruled that nothing happened which violates Kay's rights to the point where further prosection of the case should take place.

In the majority opinion, the court ruled that "...the trial judge (Burns) was entitled to rescind his acceptance of the agreement under the circumstances of this case and neither double jeopardy nor due process considerations bar the state from proceeding to trial."

"Kay may either withdraw the guilty pleas that were given as part of the aborted plea agreement and enter new pleas or he may choose to stand on his guilty pleas and proceed to sentencing ... with no guarantee as to the sentence."

Thorley would not comment on specifics of the high court opinion, but did say he was pleased at the second chance to prosecute Kay.

"We're pleased to have the opportunity to prosecute Douglas Edward Kay, which has been our object since March 1984," Thorley said. "Our desire is to seek a conviction and the death penalty."

Should the motion for a rehearing be denied, Kay will decide between the two options given him by the high court, Huntsman said. "He (Kay) has been told about the decision and knows his options," he said.